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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/509,271	03/28/2005	Bernard Cleenewerck	18234	2289
7590 10/09/2009				
Leopold Presser Scully Scott Murphy & Presser Suite 300 400 Garden City Plaza Garden City, NY 11530		EXAMINER PADEN, CAROLYN A		
		ART UNIT 1794		PAPER NUMBER
		MAIL DATE 10/09/2009		DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/509,271

Applicant(s)

CLEENEWERCK ET AL.

Examiner

Carolyn A. Paden

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 August 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 30-57 and 59-86 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 30-57 and 59-86 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/S508)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 12, 2009 has been entered.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 30-44 and 46-54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kawada (3,686,240) as further evidenced by applicant's admission in the specification at page 10, lines 3-21 and Defense article taken together.

Kawada discloses making cacao butter substitute from palm oil. In example 2 palm middle melting fraction is hydrogenated to an iodine value of 35.9 and a trans acid content of 1%. The hydrogenation process utilized copper-chromium-manganese oxide catalyst at 200C. Applicant admits

that his starting glyceride is palm mid-fraction at page 10, lines 3-21 of the specification. But further evidence of the composition of palm mid fraction is provided by Defense in Table VIII. The claims appear to differ from Kawada as further evidenced by Defense in the recitation of the extent of C18-0 in the hydrogenated product. The starting materials are the same in Kawada and the claims and the trans acids are the same and the process is the same. One of ordinary skill in the art would expect the extent of C18-0 to also be the same as a result of the process of Kawada. In this case the first fat and second fat are the same fat. Kawada teaches that his product has use as a cacao butter substitute. It is appreciated that the particular use of the fat in all of the confectionary products of the claims is not mentioned but cacao butter is a known component in confectionaries. To utilize a cacao butter substitute in place of cacao butter would have been an obvious way to provide an alternate confectionery product at a potentially lower cost to the consumer.

Applicant has filed a declaration attesting to the fact that his fat is a non-tempering fat and that the fat in Kawada is a tempering fat. This declaration has been considered but is not persuasive. At page 10, lines 3-6, of applicants specification the first fat is described as being from high

quality PMF or palm mid fraction, which is the same fat used by Kawada. Applicant describes his first fat composition at page 12, lines 6-7 to be a non-tempering fat. In example 2 palm middle melting fraction is hydrogenated to an iodine value of 35.9 and a trans acid content of 1%. The hydrogenation process utilized copper-chromium-manganese oxide catalyst at 200C. The fact that a different product may be obtained from the process is not seen to result in an unobvious process. Second the claims are not commensurate in scope with the declaration. Applicants' starting fat composition is disclosed in the declaration at point 9 to have a specific starting composition which is narrower than the fat composition set forth in the claims.

Claims 55-57 and 59-86 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The differences in the solid fat content set forth in claims 55 and 56 are indefinite because the percent difference in solid fat is based on an unknown. An amendment to the claims setting forth the specific solid fat content at 20C and 35C would overcome the rejection.

Claims 55-57 and 59-86 would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action.

Applicants' arguments relating to the product claims are persuasive. Accordingly the rejection of the product claims over the applied art has been dropped.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR

system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794